Supreme Court of the United States

October Term, 19[illegible]

No. [illegible]

[illegible]

Petitioner

v.

United States of America et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

[illegible]

IN THE

Supreme Court of the United States

October Term, 1965

No.

ALFRED T. RUNDLE, Superintendent,
State Correctional Institution,
Philadelphia, Pennsylvania,

Petitioner

v.

UNITED STATES OF AMERICA ex rel.
JAMES MORRIS JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A Writ of Certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 28, 1965.

OPINIONS BELOW

Courts of Appeals—The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

District Court—The opinion of the United States District Court has not yet been reported. It is included in the printed record in the Court of Appeals filed herewith.

Pennsylvania Supreme Court—The second opinion of the Pennsylvania Supreme Court is reported in 411 Pa. 497, 192 A. 2d 381 (1963).

Common Pleas Court of Montgomery County—The opinion of the Honorable Daniel L. Quinlan, Jr., is reported in 81 Montgomery County L.R. 37. It is included in the printed record in the Court of Appeals filed herewith.

Pennsylvania Supreme Court — The first opinion of the Pennsylvania Supreme Court, unanimously affirming conviction on direct appeal, is reported in 372 Pa. 266, 93 A. 2d 691 (1953).

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1965. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S. Code, §1254(1).

QUESTIONS PRESENTED

I. Whether it is proper for a Federal Court to make its own determination of violation of due process of law, in a state criminal prosecution, in view of a clear contrary determination by the Pennsylvania Supreme Court.

II. Whether, in a murder trial in a state court, it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the prosecution in its case in chief to put the criminal record of the defendant into evidence, for the sole purpose of use by the jury in fixing the penalty at death or life imprisonment, should they find the defendant guilty of first degree murder?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part, as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The prosecutions in this case are based on Section 919 of the Penal Code of Pennsylvania, Act of June 24, 1939, P.L. 872. 18 Purdon's Statutes 735, 736, which reads in part, as follows:

> "Whoever places wilfully and maliciously . . . takes up, removes or displaces any rail, sleeper, or other matter or thing belonging to any such railroad . . . to obstruct, upset, derail, overthrow, injure, or destroy any engine, tender, carriage, car, or track used on any such railroad . . . is guilty of a felony."

The statute under which the prosecution was made (since amended—reference to follow), was the Act of May 14, 1925, P.L. 759, which provided:

> ". . . every person convicted of . . . murder of the first degree . . . shall be sentenced to suffer death . . . or undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

The above statute has been amended by the "Split-Verdict Act" of December 1, 1959, P.L. 1621, §1, 18 P.S., §4701, which reads in part, as follows:

> "Whenever the jury shall agree upon a verdict of murder of the first degree, they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subjected to reconsideration by the

jury, or any member thereof. After such verdict is recorded and before the jury is permitted to separate, the Court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances."

STATEMENT OF THE CASE

Relator was indicted in the Court of Oyer and Terminer and General Jail Delivery of Montgomery County for the murders of Buck I. Demmy and Howard Richard Jackson, both of whom died as a result of the derailment of a Reading Company passenger train at Valley Forge on May 9, 1948.

The first trial was held in March, 1949, before the late President Judge, the Honorable Harold G. Knight, and a jury, at which time the defendant was convicted of murder in the first degree with a sentence of death.

A Motion for a New Trial was argued before the Court of Oyer and Terminer and General Jail Delivery en banc, and, after refusal, an appeal was taken to the Supreme Court of Pennsylvania. Judgment and sentence were there reversed and a new trial was ordered.

The second trial was held in October, 1951, before retired Judge George C. Corson and a jury, at which time the defendant was convicted of murder in the first degree, with sentence fixed at life imprisonment. The Commonwealth, in its case in chief, put into evidence the criminal record of the defendant (two counts of burglary in 1937, a count of obstructing a railroad in 1940 in the State of Delaware, and a count of burglary and larceny in 1948), for the sole purpose of use by the jury in fixing the penalty at death or life imprisonment should they find the defend-

ant guilty of first degree murder. Objection was made to the introduction of this evidence on the grounds of violation of due process of law. The jury was properly charged that this was the limited purpose for which it was admitted.

A Motion for a New Trial and Motion in Arrest of Judgment was refused by the Court en banc on April 1, 1952. Judgment and sentence of life imprisonment was affirmed by the Pennsylvania Supreme Court on January 5, 1953. Certiorari was denied by the United States Supreme Court, 345 U.S. 959 (1953).

Applications for pardon were made to the Pardon Board of the Commonwealth of Pennsylvania in 1958 and 1959, both of which were refused.

A Petition for a Writ of Habeas Corpus was filed in the Court of Common Pleas of Montgomery County. After argument, on June 28, 1962, former Judge Daniel L. Quinlan, Jr., vacated the judgment and sentence, and granted James Morris Johnson a new trial. An appeal from this decision was taken by the Commonwealth to the Pennsylvania Supreme Court. In an Opinion by Chief Justice Bell, the Supreme Court of Pennsylvania reversed and vacated the Order of former Judge Quinlan. Justice Cohen filed a dissenting opinion. Certiorari was denied by the United States Supreme Court, 84 Supreme Court 673 (1964).

A Petition for Writ of Habeas Corpus was filed in the United States District Court for the Eastern District of Pennsylvania. After argument, the Honorable A. Leon Higginbotham, Jr., granted the Writ on September 30, 1964. An appeal was taken by the Commonwealth to the United States Court of Appeals for the Third Circuit, and that Court affirmed the lower court decision on May 28, 1965.

The basis for Federal jurisdiction is the Federal Habeas Corpus Act, 28 U.S.C.A., §2241(c)(3).

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COURTS IN THIS CASE ARE, IN EFFECT, PROSCRIBING CERTAIN RULES OF EVIDENCE FOR THE STATE COURTS OF PENNSYLVANIA.

As it did in the case of *United States ex rel. Scoleri v. Banmiller*, 310 F.2d 729 (1962), the Court of Appeals, in affirming the decision of the District Court, has, in practice, declared invalid the procedure established by the Legislature of Pennsylvania. This procedure of entering into evidence a record of prior convictions, for the purpose of use by the jury in fixing the penalty at death or life imprisonment, in the event of a verdict of first degree murder, has been subject to considerable criticism by many courts. The *Scoleri* decision, however, was the first which rendered such a prosecution invalid. The principal distinction between *Scoleri* and *Johnson* is that, in the former case a prosecution was possible, while in the latter it is not. Aside from the question of the unfortunate precedent which it set, with Scoleri there was merely the lamentable situation of having a man *three times sentenced to death*. In the case of James Morris Johnson, a twice convicted murderer is released from prison because the Commonwealth is faced with a situation where a prosecution is rendered impossible because of passage of seventeen years from the time of commission of the offense.

As previously mentioned, because of enactment of the "Split-Verdict Act," future prosecutions of murder cases will not be jeopardized by the *precise* situation involved in the *Scoleri* and *Johnson* cases. A logical extension of the *Scoleri* decision, however, threatens the invalidation of *any* prosecution in which a record of prior convictions is introduced into evidence. The basis for upsetting the conviction in the *Scoleri* case was that introduction of a prior criminal record was "gravely prejudicial" and fundamentally unfair

and, therefore, a denial of due process of law. It would seem obvious that such a determination (of fundamental unfairness) could be made in *any* trial in which a prior record is introduced. The Court of Appeals, in both *Scoleri* and *Johnson*, "*has disregarded the repeated admonitions of the Supreme Court that individual judicial notions and concepts of 'unfairness' and 'prejudice' and 'fundamental injustice' with respect to State criminal procedures, no matter how appealing to the American sense of fair-play, is not the critical test to be applied in the application of the federal due process clause.*" Circuit Judge Kalodner, dissent, *Scoleri v. Banmiller*, supra (emphasis supplied).

There are many exceptions to the general rule of inadmissibility of prior criminal records, such as under multiple offender and habitual criminal statutes. A common practice in Pennsylvania, where the defendant takes the stand in his own behalf, is to introduce proof of commission of other crimes as affecting his credibility. *Commonwealth v. Gibbs*, 366 Pa. 182, 74 A. 2d 750 (1950); *Commonwealth v. Barclay*, 178 Pa. Superior Ct. 568, 115 A. 2d 405 (1955); *Wigmore on Evidence* (1940 Ed.) Section 891, 962. If this procedure is to be outlawed, it should be done by the Legislature of Pennsylvania and not by the United States District Courts or the United States Courts of Appeal. The Tenth Amendment of the Constitution of the United States of America has not been repealed.

II.

THE "DELICATE BALANCE OF COMITY" BETWEEN STATE AND FEDERAL COURTS IS THREATENED BY THE ACTION TAKEN IN THIS CASE.

The action of Chief Justice Weintraub of the Supreme Court of New Jersey in the case of *The United States of America ex rel. Anthony Russo et al. v. The State of New Jersey* dramatically illustrates the growing clash between Federal and State Courts. See also, for example, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harvard L. Rev. 441-528 (Jan. '63).

In former times, the Federal Courts would only interfere with State criminal proceedings where there was a clear and flagrant violation of constitutional rights. The trend today, however, seems to be that the Federal courts arrogate to themselves omniscience, while according to the highest appellate courts of the States little or no respect whatever. In this case the United States District Court completely ignores a six to one ruling by the Pennsylvania Supreme Court. Justice Cohen, in his dissent, had to reach back to the *first* trial of the case for criticism of the majority ruling.

This trend of unwarranted interference by Federal Courts in State criminal proceedings should come to a halt. It would be especially appropriate for the Supreme Court of the United States to fix the bounds of judicial propriety.

CONCLUSION

To restore a proper balance between Federal and State Courts, and to insure proper respect for the right of a state to control its police powers and court procedures, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15136

UNITED STATES OF AMERICA EX. REL.
JAMES MORRIS JOHNSON

v.

ALFRED T. RUNDLE, SUPERINTENDENT STATE CORRECTIONAL INSTITUTION, PHILADELPHIA, PENNSYLVANIA,
Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued March 5, 1965

Before BIGGS, *Chief Judge*, and FORMAN and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed May 28, 1965)

PER CURIAM

The court below made an exhaustive review of the operative facts in this case and carefully examined the pertinent authorities. We perceive no error in the proceedings and we will therefore affirm the judgment on the able opinion of Judge Higginbotham, F. Supp. (E.D. Pa. 1964).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

RUNDLE, SUPERINTENDENT *v.* JOHNSON.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 14. Decided February 13, 1967.

PER CURIAM.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Third Circuit is reversed, *Spencer* v. *Texas*, 385 U. S. ——, and the case is remanded to that court for consideration of the unresolved issues.

MR. JUSTICE DOUGLAS dissents from the reversal of the Court of Appeals (*U. S.* v. *Rundle*, 349 F. 2d 416) which affirmed *U. S.* v. *Rundle*, 243 F. Supp. 695, 700, where the District Court granted the petition for habeas corpus since the introduction of the accused's "prior criminal record for obstructing a railroad was so fundamentally unfair as to deny him due process of law."